A **KALWANT SINGH UJAGAR SINGH & ANOR v. JASWANT KAUR UJAGAR SINGH & ORS**

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
ROHANA YUSUF PCA
B NALLINI PATHMANATHAN FCJ
ZABARIAH MOHD YUSOF FCJ
HARMINDAR SINGH DHALIWAL FCJ
[CIVIL APPEAL NO: 02(f)-11-02-2020(W)]
11 FEBRUARY 2022

C

***Abstract*** *– Where the intention to specifically exclude certain beneficiaries is expressed in a testamentary instrument, the absence of a residuary clause would not entitle the beneficiaries intended to be excluded, to take under the will. The bequest will thus be shared among*
D *those whom the testator intended to benefit. As the testator's wishes are set in clear words, it behoves upon the court to ensure such wishes are implemented.*

E ***SUCCESSION:*** *Will – Distribution of estate – Intention of testator – Exclusion of certain heirs as beneficiaries – Absence of residuary clause – Whether fell into partial intestacy – Whether property ought to be distributed according to will – Wills Act 1959, s. 18*

F The first to fourth respondents ('plaintiffs') and the first to second appellants ('defendants') were the lawful children to Ujagar Singh ('Ujagar') and Nihal Kaur ('Nihal') Nihal executed her last will and testament on 5 October 2001 and passed away on 24 March 2013 while Ujagar executed his last will and testament on 31 March 2007 and passed away on 4 December 2014. Upon the deaths of Ujagar and Nihal, the first defendant was appointed as the executor for both Nihal's and Ujagar's estates. The plaintiffs subsequently
G found out through a land search at the land office that ¼ share of the property held under HS(D) 48086 ('said property') had been transferred to the defendants in equal shares on 19 August 2015. Dispute arose between the siblings in respect of the said property. The whole of the said property was divided into four shares; ¼ was held by Nihal, ¼ by Ujagar and ¼ by the
H first and second defendants respectively. The disputes as alluded to earlier relate to the said property, which was the ¼ share held by Nihal. The issue was whether the said property was willed in Ujagar's will. To resolve the dispute, the plaintiffs filed an originating summons in the High Court for certain reliefs. The High Court Judge ('HCJ') found that the said property fell
I within the residuary estate because the said property was never included in Ujagar's will. As Ujagar's will failed to specifically list down the said property to be willed away, the HCJ concluded that the same fell within the

residuary estate of Ujagar and therefore it was to be inherited by the fourth plaintiff only, in line with the intention of Nihal in her will. As a result, the HCJ allowed the originating summons application in favour of the fourth plaintiff. Aggrieved, the defendants appealed to the Court of Appeal. The Court of Appeal found that Ujagar's will did not state that he wished to give effect to Nihal's intention to give the said property to the fourth plaintiff. The Court of Appeal viewed that the HCJ, in construing Ujagar's will by using Nihal's will, had erred as it was not for the court to rewrite the terms of Ujagar's will. There was absolutely nothing in Ujagar's will that divested the said property to the fourth plaintiff. The Court of Appeal further emphasised that, when Ujagar made his will, the said property had not formed part of his assets yet, although Nihal's will was already in existence. Having read Ujagar's will, the Court of Appeal held that, it was his intention to limit his Malaysian estate only to those specifically listed in cl. 3 and the said property was obviously not part of his Malaysian estate in the will. Ujagar's will did not contain a residuary clause, which meant that Ujagar had never contemplated any other assets other than the three items listed in cl. 3 of his will. Neither could he have contemplated his inheritance of the said property as he had not even inherited the said property at the time when he made the will. Therefore, the said property formed the residuary estate, and would consequently pass to all the heirs at law of Ujagar as intestate property, in accordance with the Distribution Act 1958. The Court of Appeal thus allowed the appeal in part and the decision of the High Court was set aside. The defendants were granted leave to appeal to the Federal Court on the following single question of law: where a testator by his will creates a trust over the whole of his estate and devises and bequeaths the same to his trustee whilst specifically excluding his heirs at law as beneficiaries of his estate, does the absence of a residuary clause result in a partial intestacy over any part of the said estate.

**Held (allowing appeal)**
**Per Zabariah Mohd Yusof FCJ delivering the judgment of the court:**

**(1)** In the interpretation of wills, it is trite law that the court would not alter or add to the words of the wills unless it is perfectly clear that the will does not express the intention of the testator. 'The duty of the court in construing a will is to ascertain if possible, what the testator meant, without any preconceived ideas as to his meaning and to give effect as far as possible to his intention as declared in the will.' It is a golden rule that if the will is capable of two interpretations, the court would prefer the interpretation which disposes of the whole estate in preference to that which results in an intestacy. When a testator executed in a will in solemn form, it is presumed that he did not intend to die intestate when he has gone through the form of making a will, and such presumption against intestacy should prevail. (paras 32, 33 & 35)

**(2)** The facts showed that Nihal predeceased Ujagar. At the point when Ujagar passed away, he already had a beneficial interest in the said property which was registered in Nihal's name. As such, at that point in time, the said property formed part of Ujagar's Malaysian estate (going by the provision of s. 18 of the Wills Act 1959). It therefore followed from the expression in Ujagar's will, with particular reference to cl. 3, the Malaysian estate was devised and bequeathed to his trustee *ie*, the first defendant. This would include all real or personal property belonging to or beneficially owned by Ujagar at the point of his demise which include the said property which Ujagar obtained from Nihal. Hence, Ujagar's will had brought about a complete testamentary disposition and therefore, the said property should be dealt with by way of testamentary disposition. (paras 41 & 42)

**(3)** Where the intention to exclude certain beneficiaries is expressed in a testamentary instrument, then the absence of a residuary clause would not entitle those beneficiaries to take under the will and the bequest will be shared among those who the testator intends to benefit. This is so, even when the default position applies in consequence of there being no residuary clause. Ujagar, in clear, unambiguous and appropriate language, excluded his daughters and other sons for reasons that he had provided for them financially. Hence, the intent of Ujagar was unmistakable. Where the testator's wishes are set in clear words and by necessary implication, it behoved upon the court to ensure that such wishes were implemented. (paras 44 & 46)

**(4)** The finding of the Court of Appeal that there was no residuary clause in Ujagar's will and hence the said property fell into partial intestacy and was to be distributed in accordance with the Distribution Act 1958 was against settled law and against the clear and express intention of Ujagar in his will, which was to exclude all the plaintiffs. The wordings of cl. 4 clearly depicted an intention not to benefit those who now claim a partial intestacy. There was no judicial appreciation of this point by the Court of Appeal. (para 47)

**(5)** In construing the whole will, there was no intention on the part of the testator of a partial intestacy, in particular, based on the words 'The whole of my Malaysian estate' read together with the expressed exclusion in cl. 4 of the will. Therefore, this court answered the question posed in the negative. The order of the Court of the Appeal was set aside. The property in dispute was ordered to go to the first defendant as trustee and executor of the will to be distributed according to the will. (para 50)

***Bahasa Melayu*** *Headnotes*

Responden pertama hingga keempat ('plaintif -plaintif') dan perayu pertama hingga kedua ('defendan-defendan') adalah anak-anak sah Ujagar Singh ('Ujagar') dan Nihal Kaur ('Nihal') Nihal menyempurnakan wasiat terakhirnya pada 5 Oktober 2001 dan meninggal pada 24 Mac 2013 sementara Ujagar menyempurnakan wasiat terakhirnya pada 31 Mac 2007 dan meninggal dunia pada 4 Disember 2014. Setelah kematian Ujagar dan Nihal, defendan pertama dilantik sebagai wasi hartanah Nihal dan Ujagar. Plaintif kemudian mendapat tahu melalui carian tanah di pejabat tanah bahawa ¼ bahagian hartanah yang dipegang bawah HS(D) 48086 ('hartanah tersebut') telah dipindahkan kepada defendan-defendan dalam bahagian sama rata pada 19 Ogos 2015. Pertikaian timbul antara adik-beradik berkenaan hartanah tersebut. Keseluruhan hartanah tersebut dibahagikan pada empat bahagian; ¼ dipegang oleh Nihal, ¼ oleh Ujagar dan ¼ masing-masing oleh defendan pertama dan kedua. Pertikaian-pertikaian yang disebutkan sebelum ini berkaitan dengan hartanah tersebut, iaitu bahagian ¼ yang dipegang oleh Nihal. Isunya ialah sama ada hartanah itu dimasukkan dalam wasiat Ujagar. Untuk menyelesaikannya, plaintif-plaintif memfailkan saman pemula di Mahkamah Tinggi untuk relief-relief tertentu. Hakim Mahkamah Tinggi ('HMT') mendapati bahawa hartanah tersebut termasuk dalam baki estet kerana hartanah tersebut tidak pernah termasuk dalam wasiat Ujagar. Oleh kerana wasiat Ujagar gagal secara khusus menyenaraikan hartanah tersebut untuk diwasiatkan, HMT menyimpulkan bahawa perkara sama terangkum dalam baki estet Ujagar dan, oleh itu, akan hanya diwarisi oleh plaintif keempat, selaras dengan niat Nihal dalam wasiatnya. Akibatnya, HMT membenarkan permohonan saman pemula berpihak pada plaintif keempat. Terkilan, defendan-defendan merayu ke Mahkamah Rayuan. Mahkamah Rayuan mendapati wasiat Ujagar tidak menyatakan dia ingin memberi kesan pada niat Nihal untuk memberi hartanah tersebut kepada plaintif keempat. Mahkamah Rayuan berpendapat bahawa HMT, apabila mentafsir wasiat Ujagar menggunakan wasiat Nihal, telah terkhilaf kerana bukan untuk mahkamah menulis semula syarat-syarat wasiat Ujagar. Tidak ada apa-apa dalam wasiat Ujagar yang melepaskan hartanah tersebut kepada plaintif keempat. Mahkamah Rayuan lebih menekankan bahawa, ketika Ujagar membuat wasiatnya, hartanah tersebut belum menjadi sebahagian daripada asetnya, walaupun wasiat Nihal sudah ada. Setelah membaca wasiat Ujagar, Mahkamah Rayuan berpendapat bahawa, niatnya adalah untuk mengehadkan hartanahnya di Malaysia hanya kepada yang disenaraikan secara khusus dalam kl. 3 dan hartanah tersebut jelas bukan sebahagian daripada hartanah Malaysia dalam wasiatnya. Wasiat Ujagar tidak mengandungi klausa bakian, yang bermaksud bahawa Ujagar tidak pernah memikirkan aset lain selain daripada tiga item yang disenaraikan dalam kl. 3 dalam wasiatnya. Dia juga tidak mengambil kira pewarisannya untuk hartanah tersebut kerana dia belum pun mewarisi hartanah tersebut semasa dia menyempurnakan wasiat

itu. Oleh itu, hartanah tersebut yang membentuk baki estet, akan diserahkan kepada semua pewaris-pewaris Ujagar menurut undang-undang sebagai hartanah tidak berwasiat, sejajar dengan Akta Pembahagian 1958. Oleh itu, Mahkamah Rayuan membenarkan sebahagian rayuan tersebut dan keputusan Mahkamah Tinggi diketepikan. Defendan-defendan diberi kebenaran untuk mengemukakan rayuan kepada Mahkamah Persekutuan mengenai satu persoalan undang-undang berikut: sama ada seorang pewasiat melalui wasiatnya yang mewujudkan amanah terhadap keseluruh estetnya dan merancang dan mewariskan perkara yang sama kepada pemegang amanahnya sementara mengecualikan secara khusus beberapa pewaris sebagai benefisiari-benefisiari estetnya, adakah ketiadaan klausa bakian mengakibatkan bahagian tidak berwasiat ke atas mana-mana bahagian estet tersebut.

**Diputuskan (membenarkan rayuan)**

**Oleh Zabariah Mohd Yusof HMP menyampaikan penghakiman mahkamah:**

**(1)** Apabila mentafsir wasiat, adalah undang-undang matan bahawa mahkamah tidak akan mengubah atau menambah kata-kata wasiat kecuali jika jelas bahawa wasiat itu tidak menyatakan niat pewasiat. 'Tugas mahkamah apabila mentafsir wasiat adalah untuk memastikan, jika boleh, apa yang dimaksudkan oleh pewasiat, tanpa idea-idea yang diandaikan mengenai maknanya dan memberi kesan sejauh mungkin terhadap niatnya seperti yang dinyatakan dalam wasiat'. Adalah satu kaedah penting bahawa jika wasiat tersebut boleh diberi dua tafsiran, mahkamah lebih suka tafsiran yang melupuskan keseluruhan estet daripada yang mengakibatkannya tidak berwasiat. Apabila pewasiat menyempurnakan wasiat dalam bentuk rasmi, dianggap bahawa dia tidak berniat untuk meninggal tanpa berwasiat kerana dia telah menyediakan satu wasiat dan anggapan bertentangan dengan meninggal tanpa berwasiat harus mengatasi.

**(2)** Fakta menunjukkan Nihal meninggal dunia sebelum Ujagar. Pada saat Ujagar meninggal, dia sudah memiliki kepentingan benefisiari terhadap hartanah yang didaftarkan atas nama Nihal. Oleh itu, pada masa tersebut, hartanah tersebut merupakan sebahagian daripada Estet Malaysia Ujagar (berdasarkan peruntukan s. 18 Akta Wasiat 1959). Oleh itu, menurut wasiat Ujagar, khususnya merujuk pada kl. 3, estet Malaysia, telah didevis dan dibekues kepada pemegang amanahnya iaitu defendan pertama. Ini akan merangkumi kesemua hartanah peribadi milik Ujagar pada saat kematiannya yang merangkumi hartanah tersebut yang diperoleh Ujagar daripada Nihal. Oleh itu, wasiat Ujagar telah mewujudkan pembawaan wasiat lengkap dan oleh itu, hartanah tersebut harus ditangani melalui cara pemberian wasiat.

**(3)** Apabila niat untuk mengecualikan benefisiari-benefisiari tertentu dinyatakan dalam instrumen berwasiat, maka ketiadaan klausa bakian tidak akan memberi hak kepada benefisiari-benefisiari untuk mendapat hak bawah wasiat dan pewarisan akan dikongsi antara mereka yang diniatkan akan mendapat manfaat oleh pewasiat. Ini berlaku, walaupun apabila kedudukan asal diguna pakai akibat ketiadaan klausa bakian. Ujagar, dalam bahasa yang jelas dan sesuai, mengecualikan anak-anak perempuan dan anak-anak lelaki lain dengan alasan dia telahpun membiayai mereka secara kewangan. Oleh itu, niat Ujagar tidak dapat disangkal. Apabila wasiat pewasiat dinyatakan dalam bahasa yang jelas dan dengan implikasi perlu, mahkamah harus memastikan bahawa hasrat tersebut dilaksanakan.

**(4)** Penemuan Mahkamah Rayuan bahawa tidak ada klausa bakian dalam wasiat Ujagar dan oleh itu, hartanah tersebut terangkum dalam sebahagian harta tanpa wasiat dan akan dibahagikan menurut Akta Pembahagian 1958 bertentangan dengan undang-undang matan dan bercanggah dengan niat Ujagar yang jelas dalam wasiatnya, iaitu untuk mengecualikan kesemua plaintif-plaintif. Perkataan-perkataan dalam kl. 4 jelas menggambarkan niat untuk tidak menguntungkan mereka yang kini menuntut sebahagian harta tanpa wasiat. Tidak ada pertimbangan secara kehakiman mengenai hal ini oleh Mahkamah Rayuan.

**(5)** Apabila mentafsir wasiat secara keseluruhannya, tiada niat oleh pihak pewasiat untuk tidak mewasiatkan sebahagian harta, khususnya berdasarkan kata-kata 'Seluruh hartanah Malaysia saya' yang dibaca bersama dengan pengecualian yang dinyatakan dalam kl. 4 wasiat. Oleh itu, mahkamah ini menjawab soalan yang dikemukakan secara negatif. Perintah Mahkamah Rayuan diketepikan. Hartanah yang dipertikaikan diperintahkan untuk diserahkan kepada defendan pertama sebagai pemegang amanah dan wasi wasiat untuk dibahagikan mengikut wasiat.

**Case(s) referred to:**

*David Wee Eng Siew v. Lim Lean Seng & Anor [2014] 1 CLJ 299 FC* ***(dist)***
*Howell v. Howell Estate 1999 BCCA 371* ***(refd)***
*Hsu Yik Chai v. Hsu Yaw Tang & Anor [1983] 1 CLJ 19; [1983] CLJ (Rep) 170 FC* ***(refd)***
*Prouse v. Scheuerman 2001 BCCA 100* ***(refd)***
*Re Chin Sem Lin's Settlement; Yong Tet Fong & Anor v. Chin Thin Lee & Ors [1971] 1 LNS 120 HC* ***(refd)***
*Re Craig (1976) 14 OR (2d) 589* ***(refd)***
*Re Fleming's Will Trusts [1974] 3 All ER 323* ***(refd)***
*Re Harrison, Turner v. Hellard [1885] 30 Ch D 390* ***(refd)***
*Re Hartford (1959) 1 WIR 310* ***(refd)***
*Re Murray Estate 2007 BCSC 1035* ***(refd)***
*Re Sharpe [1985] 18 DLR (4th) 421* ***(refd)***
*Re Wilson, Wilson v. Mackay [1967] Ch 53* ***(refd)***

A *Re Wynn (Decd) [1983] 3 All ER 311* ***(refd)***
*Scale v. Rawlins [1892] AC 342* ***(refd)***
*Tan Sri Dr M Mahadevan v. Dr Jeyalakshmi Ratnavale & Ors [2017] 6 CLJ 49 CA* ***(refd)***
*Tay Seck Loong & Ors v. Teh Chor Chen & Ors [2005] 8 CLJ 686 HC* ***(refd)***
*West v. West 215 AD 285* ***(refd)***
*Young v. Abercrombie 2008 BCSC 389* ***(refd)***

B **Legislation referred to:**
Wills Act 1959, ss. 18, 20, 21, 23, 24

Wills Act 1837 [UK], s. 23

*For the appellants - Gopal Sri Ram, Harvinderjeet Singh, Sara Ann Chay Sue May*
C *& Yasmeen Soh; M/s Vin Law Co*
*For the respondents - Jasvinder Singh & Vivek Sukumaran; M/s Asyraf, Vivek & Wee*

*[Editor's note: Appeal from Court of Appeal; Civil Appeal No: W-02(NCVC)(A)-996-05-2018 (overruled).]*

D *Reported by Suhainah Wahiduddin*

## JUDGMENT

### Zabariah Mohd Yusof FCJ:

E **[1]** The appellants/defendants were granted leave to appeal to the Federal Court on the following single question of law:

> Where a testator by his will creates a trust over the whole of his estate and devises and bequeaths the same to his trustee whilst specifically excluding his heirs at law as beneficiaries of his estate, does the absence
F of a residuary clause result in a partial intestacy over any part of the said estate?

**[2]** After hearing the submissions of the parties and due consideration of the written submissions of the same, we unanimously answered the question in the negative and allowed the appeal. We hereby provide our reasons for
G the said decision.

**[3]** In this judgment, parties shall be referred to as they were, in the High Court.

### Background

H **[4]** The first to fourth plaintiffs and the first to second defendants are the lawful children of Ujagar Singh (Ujagar) and Nihal Kaur (Nihal).

**[5]** Nihal executed her last will and testament on 5 October 2001 and passed away on 24 March 2013.

I **[6]** Ujagar executed his last will and testament on 31 March 2007 and passed away on 4 December 2014.

**[7]** Upon the death of Ujagar and Nihal, the first defendant was appointed as the executor for both Nihal's and Ujagar's estates. The plaintiffs subsequently found out through a land search at the land office on 19 January 2016 that the ¼ share of the property held under HS (D) 48086, PT 47593, Mukim and Daerah Kuala Lumpur which was in Nihal's name (the said property) had been transferred to the defendants in equal share on 19 August 2015.

**[8]** Dispute arose between the siblings, in respect of the said property.

**[9]** It is to be noted that the whole property held under HS (D) 48086, PT 47593, Mukim and Daerah Kuala Lumpur were divided into four shares, ¼ was held by Nihal, ¼ by Ujagar, ¼ by the first defendant and second defendant respectively. The disputes as alluded to earlier, relate to the said property, which is the ¼ share held by Nihal.

**[10]** The issue is whether the said property was willed in Ujagar's will.

**[11]** To resolve the dispute, the plaintiffs filed an originating summons in the High Court for certain reliefs. We hereby reproduced the said reliefs prayed for, in its original text:

(i) Bahawa Defendan Pertama selaku Wasi Ujagar Singh a/l Phuman Singh Bertarikh 31.3.2007 menurut Geran probet Ujagar Singh a/l Phuman Singh (Saman Pemula No 32NCVC-308-03/2015) bertarikh 30.3.2015 melaksanakan pembahagian bagi lebihan daripada harta pusaka Ujagar Singh a/l Phuma Singh (iaitu ¼ bahagian hartanah lot kedai yang dipegang di bawah No. Hakmilik 62660, Lot 47593, Mukim Kuala Lumpur, Wilayah Persekutuan) menurut Akta Probet dan Pentadbiran 1959 kepada kesemua waris-waris Ujagar Singh a/l Phuman Singh dalam tempoh 14 hari dari tarikh perintah;

(ii) Bahawa Defendan Pertama selaku Wasi bagi Wasiat Ujagar Singh a/l Phuman Singh bertarikh 31.3.2007 menurut Geran Probet Ujagar Singh a/l Phuman Singh (Saman Pemula No 32NCVC-308-03/2015) bertarikh 30.3.2015 melaksanakan pindahmilik ¼ bahagian hartanah lot kedai yang dipegang di bawah No. Hakmilik 62660, Lot 47593, Mukim Kuala Lumpur, Wilayah Persekutuan kepada kesemua waris-waris Ujagar Singh a/l Phuman Singh dalam tempoh 14 hari dari tarikh perintah;

(iii) Bahawa Defendan-Defendan memberikan pendedahan berkenaan butiran penyewaan dan memberikan Salinan Perjanjian Penyewaan hartanah lot kedai yang dipegang dibawah No. Hakmilik 62660, Lot 47593, Mukim Kuala Lumpur, Wilayah Persekutuan kepada kesemua Plaintif-Plaintif dalam tempoh 14 hari dari tarikh perintah;

(iv) Bahawa Defendan-Defendan menyerahkan dan membahagikan hasil bayaran sewa bagi hartanah lot kedai yang dipegang di bawah No. Hakmilik 62660, Lot 47593, Mukim Kuala Lumpur, Wilayah

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> Persekutuan yang mana pengiraan hendaklah bermula dari tarikh kematian Ujagar Singh a/l Phuman Singh kepada Plaintif-Plaintif menurut bahagian yang Plaintif-Plaintif berhak menerima dalam tempoh 14 hari dari tarikh perintah.

**The Findings Of The High Court**

B

**[12]** The learned High Court Judge found that the said property fell within the residuary estate of Ujagar because the said property was never included in Ujagar's will. The will only listed down the following properties:

(i) Ujagar's own ¼ total share and interest in the shophouse No. 16, Jalan 23/70A, Desa Sri Hartamas, Kuala Lumpur; and

C

(ii) Ujagar's 2/3 share in another house No. 209, Jalan Maarof, Kuala Lumpur.

**[13]** As Ujagar's will failed to specifically list down the said property to be willed away, the learned High Court Judge concluded that the same fell within the residuary estate of Ujagar and therefore it is to be inherited by the fourth plaintiff only (and/or Harjeet's son), in line with the intention of Nihal in her will at cls. 2 and 3 of the will which state:

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> 2. I hereby declare that my will is to be construed and shall take effect in accordance with the Laws of Malaysia.

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> 3. I give to my husband, UJAGAR SINGH A/L PHUMAN SINGH ... absolutely my undivided share in the shop lot held under ... In the event my husband does not survive me, I give to my fourth son, HARJEET SINGH A/L UJAGAR SINGH ... a life interest in my undivided share in the shop lot ...

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**[14]** As a result, the learned High Court Judge allowed the OS application in favour of the fourth plaintiff only (Harjeet Singh).

**The Findings Of The Court Of Appeal**

G

**[15]** Aggrieved, the defendants appealed to the Court of Appeal. The Court of Appeal found that Ujagar's will did not state that he wished to give effect to Nihal's intention to give the said property to the fourth plaintiff. It is not for the court to speculate in the absence of such words (*Scale v. Rawlins* [1892] AC 342 referred).

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**[16]** The Court of Appeal viewed that the learned High Court Judge had construed Ujagar's will by using Nihal's will. Hence, the learned High Court Judge had erred as it is not for the court to rewrite the terms of Ujagar's will. There was absolutely nothing in Ujagar's will that divested the said property to the fourth plaintiff.

I

**[17]** The Court of Appeal emphasised that, when Ujagar made his will, the said property has not formed part of his assets yet, although Nihal's will was already in existence.

**[18]** Having read Ujagar's will, the Court of Appeal held that, it was his intention to limit his Malaysian estate only to those specifically listed in cl. 3 and the said property was obviously not part of his Malaysian estate in the will.

**[19]** Ujagar's will does not contain residuary clause, which meant that Ujagar had never contemplated any other assets other than the three items listed in cl. 3 of his will. Neither could he have contemplated his inheritance of the said property as he had not even inherited the said property at the time when he made the will. Therefore, the said property forms the residuary estate, thus consequently it will pass to all the heirs at law of Ujagar as intestate property, in accordance with the Distribution Act 1958. In support, the Court of Appeal relied on *David Wee Eng Siew v. Lim Lean Seng & Anor* [2014] 1 CLJ 299; *Hsu Yik Chai v. Hsu Yaw Tang & Anor* [1983] 1 CLJ 19; [1983] CLJ (Rep) 170; [1982] 2 MLJ 227.

**[20]** The Court of Appeal was also mindful of s. 18 of the Wills Act 1959, namely that the will of Ujagar was to take effect as if it had been executed immediately before his death *ie*, on 4 December 2014, although it was made in 2007. However, the Court of Appeal was of the view that the object of interpreting a will is to give effect to the intention of a testator that is expressed in words of the will and such words are to be read in the light of the circumstances in which the will was made. As the facts show that when Ujagar made the will, the said property had not formed part of his assets although Nihal's will was already in existence. Upon scrutinising cl. 3 of Ujagar's will, the Court of Appeal was of the view that the clause does not contemplate any other assets other than those three items listed therein. It was very clear in the mind of the Court of Appeal Judges that the said property was not willed in Ujagar's will. The Court of Appeal emphasised that they were not looking at cl. 3 alone but reading the will as a whole, including cl. 4, and concluded that the said property was not part of his Malaysian estate in the will. As Ujagar's will did not have a residuary clause, the said property went into intestacy and consequentially it will pass to all the heirs at law as intestate property in accordance with the Distribution Act 1958.

**[21]** As a result, the Court of Appeal allowed the appeal in part and the decision of the High Court was set aside.

**Submission By The Defendants/Appellants**

**[22]** Counsel for the defendants submitted that the facts showed that Nihal predeceased Ujagar, and at the point when Ujagar passed away, Ujagar already had a beneficial interest in the said property registered in Nihal's name. As such, the said property formed part of Ujagar's Malaysian estate. Thus, the phrase, "the whole of my Malaysian estate" in cl. 3 of Ujagar's will, includes the said property. For this proposition, learned counsel for the

A defendants referred to ss. 18, 20, 21 and 23 of the Wills Act 1959 to support this contention that, despite the fact that Ujagar's will did not specifically devise the said property, by referring to cl. 3 of the will, the entire Malaysian estate of Ujagar Singh including the said property, had been devised and bequeathed to the first plaintiff. There is, therefore, no need for a residuary B clause in Ujagar Singh's will.

**[23]** The defendants submitted that the Court of Appeal had overlooked the provision of s. 18 of the Wills Act which speaks of "contrary intention" of the will. There was no contrary intention in the will of Ujagar. The case of *David Wee Eng Siew v. Lim Lean Seng & Anor* which the Court of Appeal C relied upon, was the judgment of the Federal Court where there was a residuary clause and hence the property went into intestacy. It was submitted that the observation made by the Court of Appeal was pure *obiter*.

**[24]** On the point raised by the plaintiff and addressed by the Court of Appeal, that when Ujagar made the will, the said property has not formed D part of his assets yet; although Nihal's will was already in existence, learned counsel for the defendants referred to the case of *Re Fleming's Will Trusts* [1974] 3 All ER 323 at p. 325 of the law report, where there was a bequest of a leasehold land at the time when the will was made, but subsequently, the leasehold was converted into freehold. In this regard, s. 23 of the Wills E Act 1837 was relevant which provides that, every will is to be "construed, with reference to the property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator." It was held that on a "true construction of the will, the testator intended that the first defendants should take the whole estate and interest existing in the F property at the time of his death. The intention could not be negatived merely by the fact that the will referred to the estate and interest held by him at the date of the will. Accordingly, the freehold passed to the first defendants." In our present appeal, a similar provision is s. 18 of the Wills Act 1959 and applying this particular provision to the present appeal, at the G time of the demise of Ujagar, the said property was already part of his Malaysian estate, which was devised and bequeathed to his trustee, the first defendant. Ujagar's will has brought about a complete testamentary disposition. Therefore, no partial intestacy arises at the time of his death.

**[25]** Another pertinent point is that Ujagar's will contains an express H exclusion clause, namely cl. 4 which expressly excludes all the plaintiffs (being his other daughters and sons apart from the plaintiffs/appellants herein) as he had already made adequate alternative financial provision for them. Where the intention to exclude certain beneficiaries is expressed on a testamentary instrument, the absence of a residuary clause will not entitle I those beneficiaries to take under the will and the bequest will be shared among those who the testator intended to benefit. Given the aforesaid, such is the position, when the default position applies in consequence of there

being no residuary clause (refer to *Re Sharpe* [1985] 18 DLR (4th) 421; *Re Wynn (decd)* [1983] 3 All ER 311). If an intestacy is declared in the present case, it would go against the express exclusion wordings of the will.

**[26]** The Court of Appeal also overlooked a pertinent point, namely, the presumption against intestacy. The leading case on the presumption against intestacy is *West v. West* 215 AD 285 which establishes the principle that the law favours a construction of a will that will prevent partial intestacy.

**Submissions By The Plaintiffs/Respondents**

**[27]** The plaintiffs take the position that the construction given by the defendants of the phrase "... devise and bequeath the whole of my Malaysian Estate both real and personal unto my trustee upon the following trusts ..." at cl. 3 of Ujagar's will to mean that the said ¼ share also forms part of Ujagar's estate therein and that it should be bequeathed to the first plaintiff, is misconceived and manifestly incorrect because:

(i) the first plaintiff is not the sole beneficiary of Ujagar's Malaysian estate listed in his will. Ujagar intended for his Malaysian estate to be divested among the beneficiaries named therein (including the first plaintiff) as stated in the three sub-paragraphs under para. 3 of his will. It is a fact that there are other beneficiaries named in his will, including his grandson, clearly shows that Ujagar did not intend to divest the whole of his Malaysian estate solely to the first plaintiff. The first plaintiff was merely appointed as an executor and trustee who was given the responsibility to execute the distribution of Ujagar's Malaysian estate in the manner specified in the three sub-paragraphs under para. 3 of the will; and

(ii) the said property is not listed nor divested to any particular beneficiary in Ujagar's will.

**[28]** The Court of Appeal considered Ujagar's will as a whole and made clear findings of fact that para. 3 of Ujagar's will did not contemplate any other assets other than those three items listed and that the said ¼ share was not willed in Ujagar's will. These findings of fact do not constitute an error which justifies appellate intervention. As such the plaintiffs submitted that at the time when Ujagar made his will in 2007 at the age of 84, his intent is as stated in para. 4 which has to be limited to the context of his existing Malaysian estate at the time he made his will in 2007. Therefore, this court should not strain Ujagar's intent in para. 4 to assets which were not yet acquired at the time he made the will. Doing so would amount to rewriting the will and would deprive the plaintiffs of their lawful inheritance.

**[29]** On the presumption against intestacy, the plaintiffs submitted that a plain and simple reading of Ujagar's will, will inevitably result in a partial intestacy, no matter how undesirable it may be.

**[30]** Hence, the Court of Appeal correctly applied the law on the effect of the lack of a residuary clause in a testator's will as was decided by this court in *David Wee Eng Siew v. Lim Lean Seng & Anor* [2014] 1 CLJ 299. The Court of Appeal had correctly decided that the said ¼ share fell under partial intestacy and that it should be distributed in accordance with the Distribution Act 1958.

## Our Decision

*The Law In Construction Of A Will*

**[31]** It is trite law that, when a deceased dies intestate/partially intestate, the distribution of his properties/assets will be made in accordance with the Distribution Act 1958. However, at times the wordings of a will may cause disputes amongst beneficiaries as the intention of the testator may not be expressed as clearly as it could have been. In such instances, the rules of construction in interpreting a will come into play.

**[32]** *Re Murray Estate* 2007 BCSC 1035 is a good case relating to the rules of construction in interpreting a will. In the interpretation of wills, it is trite law that the court will not alter or add to the words of the will unless it is perfectly clear that the will does not express the intention of the testator. "The duty of the court in construing a will is to ascertain if possible, what the testator meant, without any preconceived ideas as to his meaning and to give effect as far as possible to his intention as declared in the will." (per Chang Min Tat J in *Re Chin Sem Lin's Settlement; Yong Tet Fong & Anor v. Chin Thin Lee & Ors* [1971] 1 LNS 120; [1971] 2 MLJ 152, at p. 154).

*Presumption Against Intestacy*

**[33]** It is a golden rule that if the will is capable of two interpretations, the court will prefer the interpretation which disposes of the whole estate in preference to that which results in an intestacy. This golden rule of the presumption against an intestacy found its way from the classic famous quote from *Re Harrison* (1885) 30 Ch D 390:

> There is one rule of construction, which to my mind is a golden rule, that when a testator has executed a will in solemn form you must assume that he did not intend to make it solemn farce – that he did not intend to die intestate when he is gone through the form of making a will. You ought, if possible, to read the wills so as to lead to a testacy, not an intestacy. This is a golden rule.

Similarly, in *Re Craig* (1976) 14 OR (2d) 589, the court affirmed on appeal and stated the rule specifically that:

> A court should only tamper with and add to the words of the will, particularly when drafted by a solicitor, where it is perfectly clear that the testator has not accurately, or completely expressed his intention. In other words, a case which is almost beyond argument.

In order to supply words not present in the will, a court must be certain: A

(a) that there has been an unintentional omission, and

(b) as to the testator's precise intention, but the testator meant to do.

This principle was further restated in *Prouse v. Scheuerman* 2001 BCCA 100.

**[34]** Our local case further strengthened this golden rule that, in B interpreting wills where the wordings are not clear and ambiguous, the court would apply certain principles that could assist in avoiding a case of partial intestacy. This was illustrated in the High Court case of *Tay Seck Loong & Ors v. Teh Chor Chen & Ors* [2005] 8 CLJ 686; [2005] 7 MLJ 612 where it was held that there is a strong presumption that where one made a will, C one did not intend to die intestate. (See also *Howell v. Howell Estate* 1999 BCCA 371). This presumption was discussed by Dorgan J in *Young v. Abercrombie* 2008 BCSC 389, at paras. 16, 18 and 19, as follows:

[16] Further, in the construction of wills, there is a strong presumption against intestacy. This often-cited principle was articulated by Lord Esher, D M.R. in *Re Harrison Estate* (1885), 30 Ch.D. 290 at 393-4, as follows:

> There is one rule of construction, which to my mind is a golden rule, *viz*, that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce – that he did not intend to die intestate when he has gone through E the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is a golden rule.

In *Baldissera v. Baldassi* (1997), 18 E.T.R. (2d) 128 (B.C.S.C.) at para. 10, Edwards J., citing The Canadian Law of Wills, vol. 2, confirmed that: F

> There is a presumption against intestacy and the court will prefer an interpretation of the will which avoids an intestacy

And further, at para. 11, Edwards J. held:

> The court on reading the will as a whole may conclude that the testator clearly intended to dispose of his entire estate. Once such G an intention is clear the court will construe the will so as to give effect to the will in preference to a construction which will result in a partial or total intestacy.

[19] A similar conclusion is found in *Jankowski v. Pelek Estate* [1996] 2 W.W.R. 457, 131 D.L.R. (4th) 717 (Man. C.A.), where Helper J.A. at H para. 76 stated, "[i]f the will is capable of two constructions, one which disposes of the whole estate and the other which leaves part of the estate undisposed of, the court will prefer the former.

**[35]** Hence when a testator executed a will in solemn form, it is presumed that he did not intend to die intestate when he has gone through the form of I making a will, and such presumption against intestacy should prevail.

(Hanschell J in *Re Hartford* (1959) 1 WIR 310). We also need to refer to the observations of Lord Esher, MR in the Court of Appeal in *Re Harrison, Turner v. Hellard* [1885] 30 Ch D 390, which also dealt with the inference to be drawn from the fact that a testator who has gone through the act of making a will, where His Lordship was reported to have said:

> There is one rule of construction, which to my mind is a golden rule, *viz*, that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce – that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is a golden rule.

**[36]** The court will therefore attempt as far as possible to read the will such that there is no intestacy or at least minimal intestacy. However, this inference of intention ought not to be drawn, where the words of the will of the testator clearly intended to die intestate, wholly or partially, or where, on a fair and reasonable construction of a doubtful will, there appears ground for a contrary conclusion (*Re Hartford*).

**[37]** The Federal Court in *Hsu Yik Chai v. Hsu Yaw Tang & Anor* [1983] 1 CLJ 19; [1983] CLJ (Rep) 170; [1982] 2 MLJ 227, had the occasion to explain the role of the court in interpreting a will, namely, to enable the testator's intentions. The circumstances in which the will was written would be taken into account, however, there is so much the court would do, as the court is still limited in giving effect to the testator's intentions in so far as they are written in the will. It should also be borne in mind that, in reading a person's will, the court will take the plain and obvious meaning of the testator's words (see *Tan Sri Dr M Mahadevan v. Dr Jeyalakshmi Ratnavale & Ors* [2017] 6 CLJ 49). From the aforesaid, if the will does not provide for the distribution of a particular property and there are no words in the will that could be interpreted to be a residuary clause, there is no way a court could assist in avoiding a case of partial intestacy. The court cannot read an intention in the will if it is not there.

*The Relevant Provisions Of The Wills Act 1959*

**[38]** In dealing with the present appeal, we take note of the provisions of ss. 18, 21, 23 and 24 of the Wills Act 1959 which are pertinent to the present appeal which read:

> Wills shall be construed to speak from the death of the testator
>
> 18. Every will **shall be construed**, with reference to the property comprised in it, to speak and **take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will**.
>
> (emphasis added)

Sections 21, 22 and 24 of the Wills Act provide that:

> Devise or bequest without words of limitation
>
> 21. Where property is devised or bequeathed to any person without any words of limitation, such devise or bequest **shall be construed to pass** the fee simple or other the right **to the whole estate** or interest in such property which the testator had power to dispose of by will **unless it appears by the will that only a restricted interest was intended** for such devisee or legatee.
>
> Construction of words importing want or failure of issue
>
> 22. Where any property shall be devised or bequeathed to any trustee or executor, such devise or bequest **shall be construed to pass** the fee simple or other the right **to the whole estate** or interest in such property which the testator had power to dispose of by will **unless a lesser interest in such property shall thereby be given to him expressly or by implication**."
>
> Devise or bequest of property to trustee without limitation
>
> 24. Where any property shall be devised or bequeathed to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such property, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise or bequest shall be construed to vest in or pass to such trustee the fee simple, or other the right to the whole legal estate or interest in such property which the testator had power to dispose of by will, and not an estate determinable when the purposes of the trust shall be satisfied.
>
> (emphasis added)

*Interpreting Nihal's And Ujagar's Wills*

**[39]** In the present appeal, the plaintiffs claimed that the transfer of the said property to the defendants was not expressly devised in Ujagar's will. For clarity, we find it pertinent to reproduce the relevant clauses of Nihal Kaur's and Ujagar Singh's wills for reference:

> Nihal Kaur's Will:
>
> ... 3. I give to my husband UJAGAR SINGH A/L PHUMAN SINGH [NRIC No: 231216-71-5151] absolutely my undivided share in the shop lot held under H.S. (D) 48086, P.T. 47593, Mukim Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan, K.L., bearing the postal address of No. 16, Jalan 23/70A, Desa Sri Hartamas, 50480 Kuala Lumpur [hereinafter called the "shop lot"]. In the event my husband does not survive me, I give to my fourth son, HARJEET SINGH A/L UJAGAR SINGH [NRIC No: 691108-10-5409] a life interest in my undivided share in the shop lot. In the event he does not survive me upon his death, I give my undivided share in the shop lot to this natural children in equal

shares and my Trustee shall hold on trust their beneficial shares until the youngest child attains the age of 30. In the event my fourth son does not have any surviving natural children, then I give to ..."

Ujagar's Will:

... 3 I appoint my son Kalwant Singh ["Kalwant"] (Malaysian IC NO: 600317-10-6487) of 10 Lorong 8/3E, Sec 8, Petaling Jaya to be the executor of an trustee ["my trustee'] of this my Malaysian will and estate and devise and bequeath the whole of my Malaysian estate both real and personal unto my trustee upon the following trusts.

(i) To sell call in and convert my shares and moneys held in banks and financial institutions for payment thereout of my just debts and funeral and testamentary expenses and to hold the residue on trust for my wife Nihal Kaur @ Manjeet Kaur ["Nihal"] (Malaysian IC No: 380120-10-5016).

(ii) I give my one-fourth title share and interest in shophouse No: 16, Jalan 223/70A, Desa Sri Hartamas, Kuala Lumpur ("the said shophouse") being the land described in certificate of title HS(D) 48086 PT 47593, Mukim and Daerah Kuala Lumpur to my sons Kalwant and Hardeep Singh ["Hardeep"] (Malaysian IC NO: 5909107-10-6503) in equal shares as tenants in common subject to the life interest of my wife Nihal during her lifetime to the receipt and retention of all rentals receivable for the shophouse for her own benefit. The other part-owners of the shophouse Hardeep and Kalwant have agreed to honour this agreement.

(iii) I give my two-thirds share title and interest in house NO. 209 Jalan Maarof, Kuala Lumpur ("the said house") being the land held under certificate of title Geran 3114 Lot 28597 Mukim and Daerah Kuala Lumpur unto my son Kalwant and my grandson Talvinder Singh Choan in equal shares as tenants in common subject to the prior unconditional life interest of my wife Nihal to reside in the said house during her lifetime if she so decides.

4. I declare that I have intentionally not made provision under this my will for my daughters and other sons for reason that I have already made adequate alternative financial provision for them.

**[40]** We noted certain pertinent words in cls. 3 and 4 of Ujagar's will which state:

3. I appoint my son Kalwant Singh ... to be the executor of and trustee ("my trustee") of this my Malaysian will and estate and devise and bequeath **the whole of my Malaysian estate** both real and personal unto my trustee upon the following trusts ...

(emphasis added)

In *Re Wilson, Wilson v. Mackay* [1967] Ch 53, 57, it has been held that:

> A gift can be residuary although no gift of a similar kind has been previously given. **A gift of "all my real estate" includes any land held by the testator at his death**. Before the Wills Act 1837, the testator could give away realty, but only such as he owned at the date of the will. But since s. 24 of the Wills Act, 1837, every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear in the will ...
>
> (emphasis added)

In *Re Fleming Trusts* [1974] 3 All ER 323, a testator, who by his will executed in 1969, willed his leasehold house to the first defendant. At that point in time, the house was held under a lease term expiring on 28 September 2008 subject to covenants to repair. The leasehold interest was not registered. In April 1971, the testator purchased the freehold and registered in the land registry with title absolute. The testator died in February 1973. The plaintiff, as sole executor of the will, applied for determination of interest that passed on to the first defendant. The second defendants, who were residuary beneficiaries under the will claimed that the first defendant was only entitled to leasehold interest. Disagreeing with such contention, Templeman J, in delivering the judgment said:

> In my judgment, a gift of property discloses an intention to give the estate and interest of the testator in that property at his death; a mere reference in the will to the estate and interest held by the testator at the date of his will is not sufficient to disclose a contrary intention. It follows that the freehold in the case passes to the first defendant.

**[41]** The facts show that Nihal predeceased Ujagar. At the point when Ujagar passed away, he already had beneficial interest in the said property which was registered in Nihal's name. As such at that point in time, the said property formed part of Ujagar's Malaysian estate (going by the provision of s. 18 of the Wills Act 1959). The case of *Tay Seck Loong* is relevant to our present case, where it was held at paras. 25 to 30 that:

> [25] In my judgment, the clauses which fall to be construed are cls. 4, 5 and 6 which where relevant merits reproduction as follows:
>
> > Clause 4: I devise and bequeath all my movable and immovable property whatsoever and wheresoever situate (including any property over which I may have any general power of appointment by will) hereinafter called 'my residuary estate') to my trustees subject to the payment thereout of my debts funeral and testamentary expenses and death duties upon trust to manage the same until the youngest of my great grandsons who shall be living at my death shall attain the age of twenty one years ...

A [26] From the language used in these clauses, I am of the view that cl 4 reflects the intention of the testatrix to demise and bequest all her movable and immovable property to her trustees, and after the payment thereout of her debts, funeral and testamentary expenses and death duties, upon trust to manage the same until the date of distribution.

B ...

[29] In relation to the issue of partial intestacy, as submitted for the aforesaid defendants, I am of the view that cases of partial intestacy would only arise under s. 8 of the Distribution Act 1958 ('s 8'), where relevant, provides that where any person dies leaving a will beneficially disposing of part of his property, the provisions of the Distribution Act C 1958 shall have effect as respects the part of his property not so disposed of, subject to the provisions contained in the will. Hence, s. 8 regulates cases of partial intestacy in which a testator has made a will wherein only a part of his property is to be disposed of under his will, while the other part is not included in his will, as a result of which, only the part included D in the will shall be dealt with by way of testamentary disposition.

[30] The agreed facts show that the testatrix has *vide* cl. 4 devised and bequeathed all her movable and immovable properties to her trustees. That being the case, the will has brought about a complete testamentary disposition. There is no question of a partial intestacy coming within the ambit and purview of s. 8.

E

**[42]** It therefore follows from the expression in Ujagar's will, with particular reference to cl. 3, the Malaysian estate was devised and bequeathed to his trustee, *ie*, the first defendant. This would include all real or personal property belonging to or beneficially owned by Ujagar at the F point of his demise which include the said property which Ujagar obtained from Nihal. Hence, Ujagar's will has brought about a complete testamentary disposition and therefore, the said property should be dealt with by way of testamentary disposition.

*Exclusion Clause*

G **[43]** We took note of the pertinent words in cl. 4 of Ujagar's will which stated:

> 4. I declare that I have **intentionally not made provision under this my will for my daughters and other sons** for reason that I have already made adequate alternative financial provision for them.
>
> (emphasis added)

H

Clause 4.1 is an express declaration by Ujagar Singh which excludes all the plaintiffs (being his daughters and other sons apart from the defendants herein).

I

**[44]** It is settled law that where the intention to exclude certain beneficiaries is expressed in a testamentary instrument, then the absence of a residuary clause will not entitle those beneficiaries to take under the will and the bequest will be shared among those who the testator intend to benefit. This is so, even when the default position applies in consequence of there being no residuary clause. The Supreme court of Canada has the occasion to decide on this principle in *Re Sharpe* [1985] 18 DLR (4th) 421, where there was a specific devise made by the testator in favour of his son, Sharpe, but he did not dispose of the balance of his estate. In the will, the testator provided that his wife and his six other children were to receive nothing. Action was instituted by the administratrix to construe the will in question. It was held that:

> On a partial intestacy, normally the portion of the estate not dispose of by the testator in his will is to be distributed among the persons entitled on an intestacy in accordance with s. 14 of the Intestate Succession Act, R.S.N. 1970, c. 183. However, where the testator clearly indicates in his will that some, but not all of those persons shall share in his estate, there is an implied gift to the other person or persons entitled on intestacy.

**[45]** Warner J in his reasons for His Lordship's judgment in *Re Wynn (Decd)* [1983] 3 All ER 311, set out what is the correct statement of the law with regards to the declaration of exclusion of certain persons in a will, whereby a declaration excluding one or some only of the next of kin if made in clear and appropriate language, is valid, and operates as a gift by implication to the rest of the share of those who are excluded. In *Re Wynn (Decd)* it was held that:

> On its true construction the will excluded the husband from taking under the will or on the intestacy. Furthermore, the exclusion was valid ... and operated as a gift by implication of the husband's share to the other Persons interested on the intestacy.

**[46]** In the instant appeal, Ujagar, in clear, unambiguous and appropriate language, excluded his daughters and other sons for reasons that he has provided for them financially. Hence, the intent of Ujagar is unmistakable. Where the testator's wishes are set in clear words and by necessary implication, it behoves upon the court to ensure that such wishes are implemented.

**[47]** The Court of Appeal found that there was no residuary clause in Ujagar's will, and hence, the said property fell into partial intestacy and was to be distributed in accordance with the Distribution Act 1958. This finding is against settled law and against the clear and express intention of Ujagar in his will at cl. 4, which is to exclude all the plaintiffs. The wordings of cl. 4 clearly depicts an intention not to benefit those who now claim a partial intestacy. There was no judicial appreciation of this point by the Court of Appeal.

**[48]** The Court of Appeal referred to and followed the Federal Court case of *David Wee Eng Siew v. Lim Lean Seng & Anor* [2014] 1 CLJ 299, which in our view is distinguishable from the facts in our present case. Unlike the facts of our present case, in *David Wee,* there is no express intention of the testator in the will to exclude certain beneficiaries.

**Conclusion**

**[49]** Given the aforesaid, the Court of Appeal fell into an erroneous finding that the subject property fell within the residuary estate of Ujagar and that since there is no residuary clause in Ujagar's will, it will be distributed to all the heirs at law as intestate property pursuant to the Distribution Act 1958.

**[50]** In construing the whole will, there is no intention on the part of the testator of a partial intestacy, in particular based on the words "The whole of my Malaysian estate ..." read together with the expressed exclusion in cl. 4 of the will. We therefore answered the question posed in the negative and allowed the appeal. We set aside the order of the Court of Appeal and ordered that the said property in dispute goes to the first defendant (the first appellant herein) as trustee and executor of the will to be distributed according to the will. We made no order as to costs.